Headquarters U.S. Air Force

Integrity - Service - Excellence

SAFETY INVESTIGATIONS AND THE SAFETY PRIVILEGE

U.S. AIR FORCE

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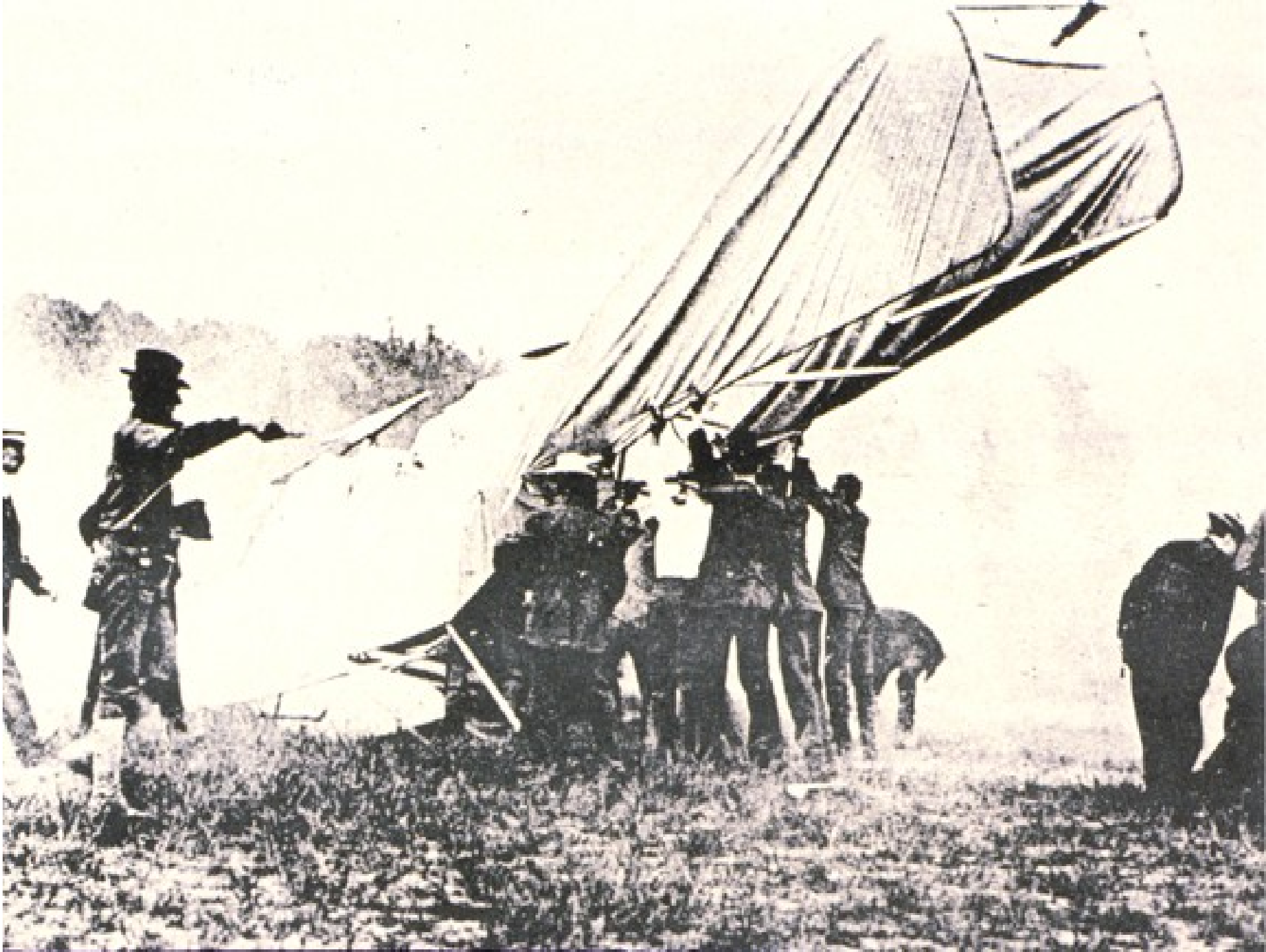

OBJECTIVE

- **Understand Safety Privilege**
  - What is it?
  - Purpose?
  - What is the promise of confidentiality?
  - History?
  - Who has access to privileged information and when?
  - What is privileged?
  - How to handle witness interviews?

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PRIVILEGED INFORMATION IN ALL SAFETY REPORTS

- **Aircraft, Space, Missile, Nuclear**
  - Board's analysis, findings and recommendations
  - Witness statements given under promise of confidentialit
- **Ground, Explosive**
  - Board's analysis, findings and recommendations
  - Promises of confidentiality are NOT authorized
    - Limited exceptions…requires AF/SE approval

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MAJOR MISHAP (CLASS A) AIRCRAFT, SPACE, & MISSILE

- **Two Investigations…Safety and Accident**
  - Governed by Different AFIs
    - AFI 91-204, Safety Investigation. A privileged report.
    - AFI 51-503, Accident Investigation. A report available to the public.
  - Different Board Members
    - AFI 91-204, Para. 4.4.3

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CLASS A FORMAL SAFETY REPORT

- **Written in Two Parts**
- **Part 1 Contains Factual Information**
  - Given to Accident Investigation Board (AIB) and it becomes Tabs A-S of their report… verbatim
- **Part 2 is Privileged**
  - Tabs T-Z

CLASS A FORMAL SAFETY REPORT

- **Part 2 Contains Privileged Information**
  - Confidential
  - Not Releasable
  - Mishap Prevention Only

A Rule of Evidence

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SAFETY PRIVILEGE

- Military safety privilege is a government evidentiary privilege
- Empowers SECAF to restrict the release of information to the public, to litigants in a civil court, or to the parties in a criminal court
- SECAF's decision can be reviewed by federal judge

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MILITARY SAFETY PRIVILEGE

- **A Government Privilege Available Only to DoD**
- **NTSB Must Rely on Statutory Powers**
  - Subpoena authority
  - Witnesses permitted to have attorney, other representative present during all interviews
  - Fact finding is quick…conclusion is often delayed

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PURPOSE OF SAFETY PRIVILEGE

- Encourage frank and open communication with witnesses and contractors
- Allow commander to quickly obtain accurate mishap information
- Helps ensure appropriate corrective action, thereby enhancing national security

AF/SE SUPREME COURT AFFIDAVIT

- **National Security**
  - Aircraft accidents adversely affect
    - Safety program reduces accidents
    - Program depends on candid/complete information
  - Privilege helps us get candid/complete information

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PROMISE OF CONFIDENTIALITY

- **Promise of Confidentiality…Two Part Promise**
  - AFI 91-204, Figure 2.3., Sample Privileged Witness Statement
  - "…my confidential statement **will not be made public** outside Department of Defense safety channels, and it **will only be used for safety purposes**…will not be used as evidence to support any disciplinary action or any adverse administrative action…can be released pursuant to a valid court order on behalf of the defense in a criminal trial…[if] I lie, then my statement will no longer be considered confidential…."

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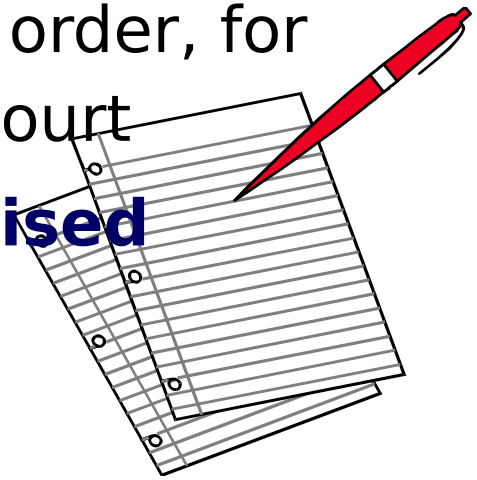
WITNESS CONFIDENTIALITY

- **Statements Only Used for Safety Purposes**
  - Exceptions:
    - If you lie
    - Pursuant to a valid court order, for defendant in a criminal court
- **Witnesses/contractors Advised**



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PROMISE OF CONFIDENTIALITY

- **Who is Authorized to Make Promise of Confidentiality**
  - Primary duty safety personnel in DCG
  - ISB and SIB members
- **Who may Receive Promise of Confidentiality**
  - Any witness
  - Includes contractors who designed, built, maintained equipment

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PROMISE OF CONFIDENTIALITY

- **When is Promise Given?**
  - Investigator discretion to encourage witness or contractor cooperation
  - Not on blanket basis to every witness
- **Document the Promise**
  - Use draft templates, AFI 91-204, Chapter 2, to document it in oral and written statements

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SAFETY PRIVILEGE HISTORY

- Privilege Based on Case Law
- Stare Decisis (let the Decision Stand)
- Key Cases are Important

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SAFETY PRIVILEGE HISTORY

- ***Machin v. Zuckert (1963)***
  - B-25 crew from Lowry AFB
  - Machin sues propeller manufacturer
  - Machin asks for AF investigation
- **SECAF Claimed Executive Privilege**

SAFETY PRIVILEGE HISTORY

- ***Machin* Court Stated**
  - "…when disclosure of investigative reports obtained in large part through promises of confidentiality would hamper the efficient operation of an important Government program and perhaps even…impair the national security…the reports should be considered privileged."

- ***Machin* Court Held**
  - Facts are not privileged
  - Promises will be honored
  - Deliberations, conclusions, recommendations are privileged

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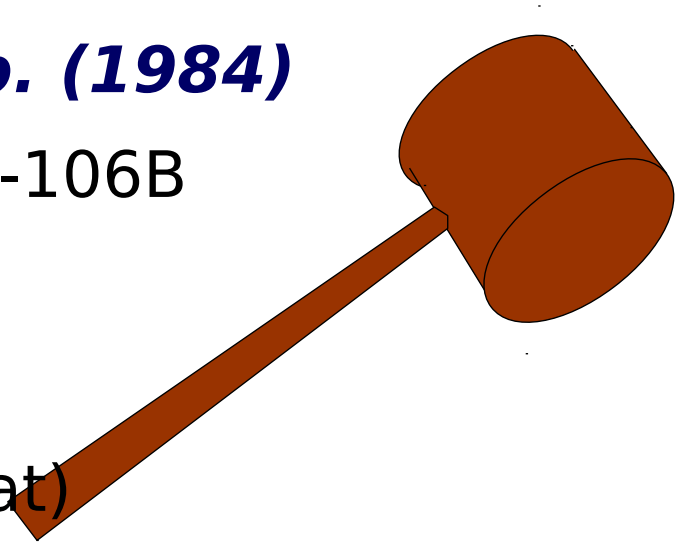
HISTORY; WAIVER

- ***Cooper v. Department of the Navy (1979)***
  - Marine killed in helicopter crash
  - Widow sues for safety report
    - Argues waiver
      - Court first says no waiver
      - Later court reverses
  - Privilege waived by unauthorized release
  - Risk permanent loss of privilege

HISTORY; U.S. SUPREME COURT

- ***U.S. v. Weber Aircraft Corp. (1984)***
  - Captain Richard Hoover's F-106B
    - Engine stops
    - Ejection seat fails
    - Sues Weber (ejection seat)



- **Weber Sues for Report Under FOIA**
  - Unanimous decision by Supreme Court
    - Safety privilege trumps FOIA

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WHO MAY SEE PRIVILEGED INFORMATION (WHEN NECESSARY FOR MISHAP PREVENTION)

- **Commanders**
- **Safety Officers**
- **AFSC Personnel**
- **Air Crews**
- **Maintenance and Logistics Personnel**
- **Contractors (Limited)**
- **Air National Guard and Reserve**
- **Other U.S. Military Services and Coast Guard**
- **NTSB/FAA (Essential Information)**

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WHAT IS PRIVILEGED?

- **Formal, Two-Part Report**
  - Part II is privileged
  - Tabs T-Z
  - Special consideration for Tab Y (next slide)
- **Tabs T and Z…SIB's Analysis, Findings and Recommendations**
- **Tab U…Statements made with Promise**
- **Tab V…Statements of Persons found Causal**
- **Tab W…Contractor Reports made with Promise**

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TAB Y DOCUMENTS

- **Medical Member's Analysis, Medical Histories (8 & 72 hour, 14 day), Privileged**
  - Very likely promise of confidentiality given

- **Following Reports are Sensitive, not Privileged (Given to AIB but Put in Tab Y):**
  - Coroner's Report
  - Toxicology Test Results
  - Autopsy Protocols

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WITNESS INTERVIEWS

- **Prepare Questions Before the Interview**
  - Checklist approach
- **Anticipate the Unexpected**
- **Let the Witness Speculate**
- **Witnesses can be Recalled**

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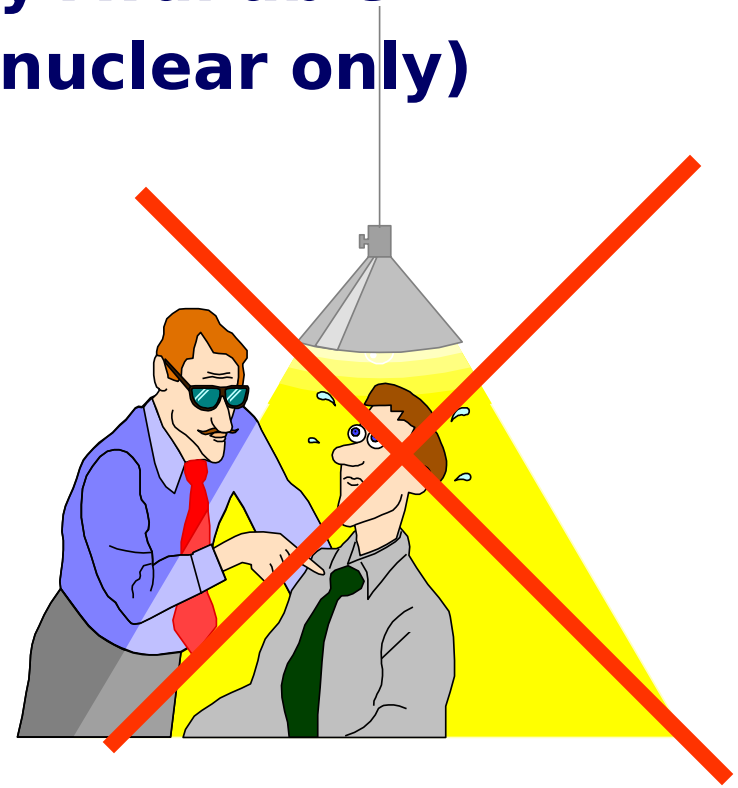
WITNESS INTERVIEWS

- **Promise of Confidentiality Available (aircraft, space, missile, nuclear only)**
- **Not Under Oath**
- **No Article 31 Rights**
- **Note Any Medications**



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COMPELLING TESTIMONY

- **Final Option…Cooperation is Key**
- **Get Command/Civilian Supervisor Involved Early**
- **Depends on Status of Witness**
  - Military Members: Yes
  - Civilian DoD Employees: Yes
  - Contractor Employees: Terms of Contract
  - Civilians: Persuasion Only

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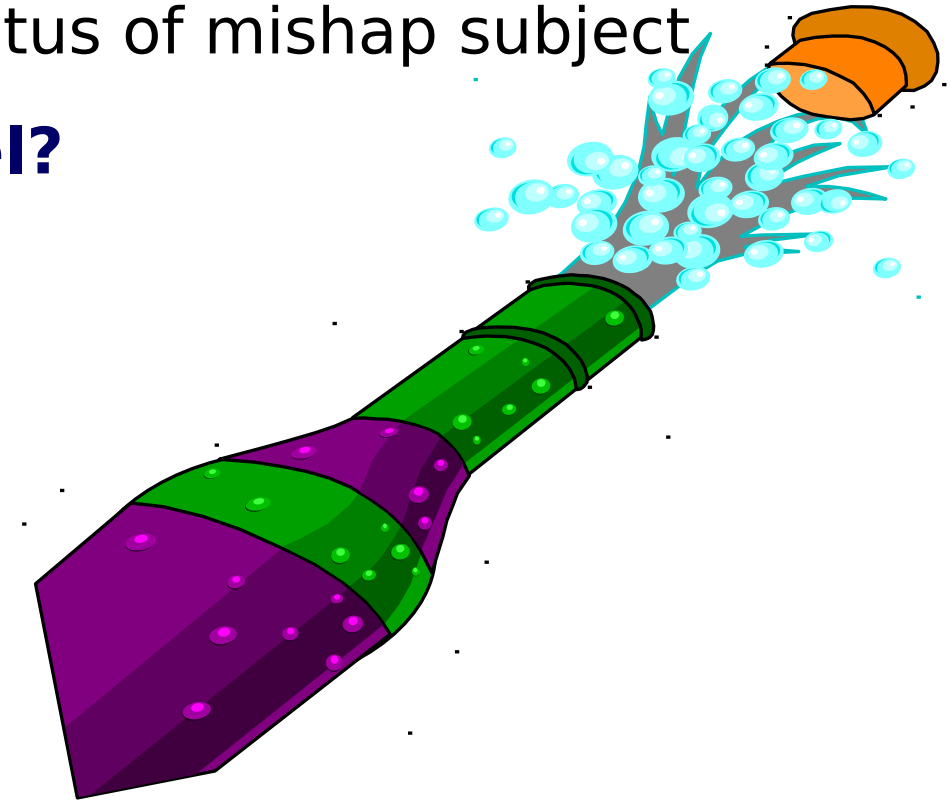
TOXICOLOGY TESTING

- **Can We Compel?**
  - Depends on status of mishap subject
- **Who Can Compel?**
  - Commander



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WHO CAN BE COMPELLED?

- **Flight Crews If Class A/B Mishap**
- **Military If Factors In Mishap Sequence**
  - Commander's judgment
  - Class A/B/C mishaps
- **DoD Civilians**
  - If evidence they may have caused mishap
  - Consult base SJA and personnel

WHO CAN BE COMPELLED? (Continued)

- **Guard**
  - Consent
  - Can compel if Title 10
  - If not Title 10, place on active duty
    - Commander orders

WHO CAN BE COMPELLED? (Continued)

- **Contractor Employees**
  - If Factor In Mishap Sequence
  - But Only:
    - If Required By Contract
    - Or They Consent

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PENALTIES FOR UNAUTHORIZED DISCLOSURE OR USE

- **Military**
  - Confinement for two years
  - Dismissal or dishonorable discharge
  - Forfeiture of pay and allowances
  - Reduction to lowest grade
- **Authority - Article 92 and AFI 91-204**

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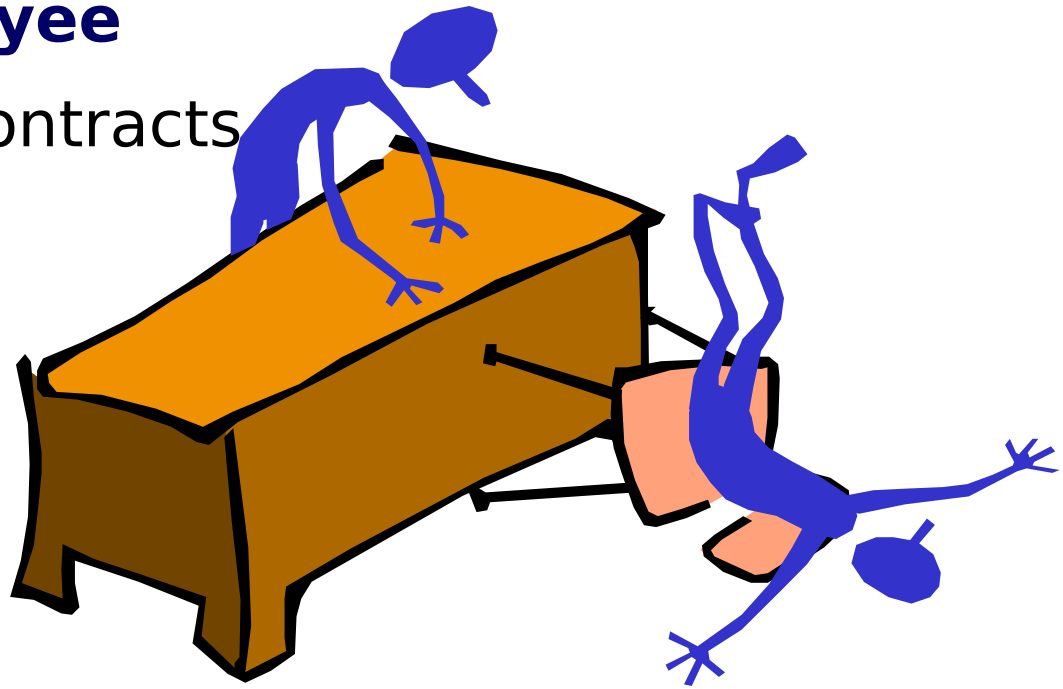
PENALTIES FOR UNAUTHORIZED DISCLOSURE OR USE

- **DoD Civilian**
  - Reprimand, suspension, termination
- **Contract Employee**
  - Affect future contracts



CONCLUSION

National Security Depends on Airpower

Accidents Adversely Affect Airpower

Safety Program Reduces Accidents

Safety Privilege Is Integral Part of Safety Program

Questions and Answers